

10.1 UNLICENSED CARRYING A CONCEALED [WEAPON] [FIREARM]

§ 790.01, Fla. Stat.

To prove the crime of Unlicensed Carrying a Concealed [Weapon] [Firearm], the State must prove the following three* elements beyond a reasonable doubt:

1. (Defendant) knowingly carried on or about [his] [her] person [a firearm] [a weapon] [an electric weapon or device].
2. The [firearm] [weapon] [electric weapon or device] was concealed from the ordinary sight of another person.
- 3.* At that time, (defendant) was not licensed to carry a concealed [weapon] [electric weapon] [firearm].

Ensor v. State, 403 So. 2d 349 (Fla. 1981); Dorelus v. State, 747 So. 2d 368 (Fla. 1999).

The term “on or about [his] [her] person” means physically on the person or readily accessible to [him] [her].

The term “ordinary sight of another person” means the casual and ordinary observation of another in the normal associations of life. A [firearm] [weapon] need not be completely hidden for you to find that it was concealed. However, a [firearm] [weapon] is not concealed if, although not fully exposed, its status as a [firearm] [weapon] is detectable by ordinary observation.

Definitions. Give only the applicable paragraphs. § 790.001, Fla. Stat.

A “concealed weapon” means any dirk, metallic knuckles, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such manner as to conceal the weapon from the ordinary sight of another person.

A “deadly weapon” is any object that will likely cause death or great bodily harm if used in the ordinary and usual manner contemplated by its design and construction.

An object not designed to inflict bodily harm may nonetheless be a “deadly weapon” if it was intended to be used [or threatened to be used] in a manner likely to cause death or great bodily harm.

“Great bodily harm” means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises.

“Electric weapon or device” means any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury.

A “firearm” means any weapon [including a starter gun] which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; [the frame or receiver of any such weapon;] [any firearm muffler or firearm silencer;] [any destructive device;] [any machine gun]. [The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of another crime. An antique firearm is *(insert definition in 790.001(1), Fla. Stat.)*] [A destructive device is *(insert definition in § 790.001(4), Fla. Stat.)*].

State of emergency. § 790.01(3)(a), Fla. Stat. The statute and case law are silent as to: (1) which party bears the burden of persuasion of the defense, and (2) the standard for the burden of persuasion. Under the common law, defendants had both the burden of production and the burden of persuasion on affirmative defenses by a preponderance of the evidence. The Florida Supreme Court has often decided, however, that once a defendant meets the burden of production on an affirmative defense, the burden of persuasion is on the State to disprove the affirmative defense beyond a reasonable doubt (e.g., self-defense and consent to enter in a burglary prosecution). In the absence of case law, trial judges must resolve the issue via a special instruction. See the opinion in Dixon v. United States, 548 U.S. 1 (2006), for further guidance.

It is a defense to the charge of Unlicensed Carrying a Concealed [Weapon] [Firearm] if a person [carries a concealed weapon] [who may lawfully possess a firearm, carries a concealed firearm] on or about [his] [her] person, while in the act of evacuating during a mandatory evacuation order issued during a state of emergency declared by [the governor under Chapter 252 of Florida Statutes] [a local authority under Chapter 870 of Florida Statutes].

“In the act of evacuating” means the immediate and urgent movement of a person away from the evacuation zone within 48 hours after a mandatory evacuation is ordered. [The 48 hours may be extended by an order issued by the Governor.]

If burden of persuasion is on the defendant:

If you find that defendant proved (insert appropriate burden of persuasion) that, at the time of the carrying, [he] [she] was in the act of evacuating during a mandatory evacuation order issued during a state of emergency that had been declared by [the governor under Chapter 252 of Florida Statutes] [a local authority under Chapter 870 of Florida Statutes], you should find [him] [her] not guilty.

If the defendant did not prove (insert appropriate burden of persuasion) that, at the time of the carrying, [he] [she] was in the act of evacuating during a mandatory evacuation order issued during a state of emergency that had been declared by [the governor under Chapter 252 of Florida Statutes] [a local authority under Chapter 870 of Florida Statutes], you should find [him] [her] guilty, if all the elements of the charge have been proven beyond a reasonable doubt.

If burden of persuasion is on the State:

If you find that the State proved (insert appropriate burden of persuasion) that, at the time of the carrying, the defendant was not in the act of evacuating during a mandatory evacuation order issued during a state of emergency that had been declared by [the governor under Chapter 252 of Florida Statutes] [a local authority under Chapter 870 of Florida Statutes], you should find [him] [her] guilty, if all the elements of the charge have been proven beyond a reasonable doubt.

If you find that the State failed to prove (insert appropriate burden of persuasion) that, at the time of the carrying, the defendant was not in the act of evacuating during a mandatory evacuation order issued during a state of emergency that had been declared by [the governor under Chapter 252 of Florida Statutes] [a local authority under Chapter 870 of Florida Statutes], you should find [him] [her] not guilty.

§ 790.01(3)(b), Fla. Stat. The statute and case law are silent as to: (1) which party bears the burden of persuasion of the affirmative defense, and (2) the standard for the burden of persuasion. Under the common law, defendants had both the burden of production and the burden of persuasion on affirmative defenses by a preponderance of the evidence. The Florida Supreme Court has often decided,

however, that once a defendant meets the burden of production on an affirmative defense, the burden of persuasion is on the State to disprove the affirmative defense beyond a reasonable doubt (e.g., self-defense and consent to enter in a burglary prosecution). In the absence of case law, trial judges must resolve the issue via a special instruction. See the opinion in *Dixon v. United States*, 548 U.S. 1 (2006), for further guidance. Also, judges can insert the appropriate “burden of persuasion” language from the “state of emergency” defense section above.

It is a defense for a person who carries for purposes of lawful self-defense, in a concealed manner:

- 1. A self-defense chemical spray.**
- 2. A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.**

Lesser Included Offenses

UNLICENSED CARRYING A CONCEALED [WEAPON] [FIREARM] — 790.01(1) and (2)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

*In Chapter 2015-44, Laws of Florida, the Legislature amended § 790.01, Fla. Stat. in a way that likely makes absence of a license an element of the crime. Prior to this statutory amendment, licensure was an affirmative defense. *Mackey v. State*, 124 So. 3d 176 (Fla. 2013). The Committee on Standard Jury Instructions in Criminal Cases believes *Mackey* was probably abrogated by the 2015 change to the statute.

See § 790.25(5), Fla. Stat. for the defense for adults who carry weapons for self-defense or another lawful purpose within the interior of a private conveyance if securely encased or otherwise not readily accessible for immediate use.

See *Santiago v. State*, 77 So. 3d 874 (Fla. 4th DCA 2012) for the law on carrying a concealed weapon within one’s own home.

See § 790.06, Fla. Stat. for the definition of license to carry a concealed weapon or firearm.

A special instruction will be necessary in cases where the deadly weapon was an animal or a substance or something that is not commonly referred to as an “object.”

This instruction was adopted in 1981, and was amended in 1989, 2013 [131 So. 3d 720], 2018 [253 So. 3d 1040], and on April 3, 2020.